Supreme Court, U.S.
FILED
OCT 4 1991
OFFICE OF THE CLERK

(3)

No. 91-132

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

LLOYD LITTLEFIELD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITIONER'S REPLY BRIEF

R. JAY ENGEL *
ELLYN MOSCOWITZ
ENGEL & GERTLER
44 Montgomery Street
Suite #2000
San Francisco, CA 94104
(415) 399-1300
Attorneys for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
I. SUMMARY OF SOLICITOR GENERAL'S INADEQUATE RESPONSE	1
II. STATEMENT CLARIFICATION	2
III. THE UNITED STATES SAFETY INSPECTORS DID HAVE A DUTY TO ACT	5

TABLE OF AUTHORITIES

CASES Page

Camozzi v. Roland/Miller and the United States of America, 866 F.2d 287 (9th Cir. 1989) 7
Harrigan v. City of Reno, 86 Nev. 678, 475 P.2d 94 (1970) 6, 7
Hatahley v. U.S., 351 U.S. 173, 181, 76 S.Ct. 745 (1956) 7
Hogblam v. State Director, 93 Nev. 599, 571 P.2d 1172 (1977) 6
Ivanhoe Irrigation v. McCracken, 357 U.S. 275, 295, 78 S.Ct. 1174, 1185 (1958) 4, 8
McGarry v. United States, 549 F.2d 987 (9th Cir. 1976) 7
Nevada Transfer v. Warehouse Company, 60 Nev. 87, 99 P.2d 633 (Nevada 1940) 5
Rayonier v. United States, 352 U.S. 315, 77 S.Ct. 374 (1957) 7
State v. Silva, 86 Nev. 911, 478 P.2d 591 (1970) 6, 7
State v. Webster, 88 Nev. 690, 504 P.2d 1316 (1972) 6
Taylor v. Silva, 96 Nev. 738, 615 P.2d 970 (1980) 5, 7
United States v. Muniz, 374 U.S. 150, 164-165, 83 S.Ct. 1850 (1963) 7
United States v. Yellow Cab, 340 U.S. 543, 548-550, 71 S.Ct. 399, 403 (1951) 7

STATUTES

28 U.S.C. § 2680(a) 6, 7
30 U.S.C. § 1 7
43 U.S.C. § 315 (Taylor Grazing Act) 7
Nev. Rev. Stat. § 41.130 5
Nev. Rev. Stat. § 41.032 ..... 6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-132

LLOYD LITTLEFIELD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITIONER'S REPLY BRIEF

I. SUMMARY OF SOLICITOR GENERAL'S INADEQUATE RESPONSE

The Solicitor General sets forth as the "question presented" a limited interpretation of the District Court's Findings of Fact and Conclusions of Law. More specifically, the question as presented by the Solicitor General deliberately and carefully ignores both questions actually presented by Petitioner. Consequently, the Solicitor General's Opposition simply does not address the questions Petitioner has presented to this Court.

In a similar fashion, the "Statement" set forth by the Solicitor General omits the evidentiary basis the District Court had for concluding that the United States Government was independently negligent.

Thus, one issue addressed and decided by the District Court, but ignored by the Ninth Circuit and the Solicitor General, is whether Nevada case law can preempt self-imposed federal regulations which mandate that the U.S. Government be responsible for maintaining a safe work site on federal government property.

The second issue not addressed by the Ninth Circuit nor by the Solicitor General is whether the District Court correctly concluded that the United States was independently negligent. The District Court so concluded. Neither the Ninth Circuit nor the Solicitor General contended the Government was *not negligent.*

II. STATEMENT CLARIFICATION

The Solicitor General's Statement, appearing at pages 2-6, omits the District Court's Findings of Facts relative to the time period between March 4, 1986 and April 18, 1986, the date Petitioner was injured. This omission of critical findings made by the District Court may explain the Solicitor General's skewed analysis of the applicable law.

As set forth in the Petition (page 5), the District Court referred to the safety meeting of March 4, 1986 wherein the slide dangers from this muck were discussed. However, the Court went on to find that "the danger was *thereafter* considered by the Bureau of Reclamation Safety Manager Jesse Wert, and Safety Inspectors Harold Whitney and Mark Pata, and was brought to the attention of Frontier Kemper employees prior to April 18, 1986."

Some of the evidence supporting this finding by the District Court was contained in the Supplemental Excerpts of Record and Additional Supplemental Excerpts of Record submitted to the Ninth Circuit. Pages 18, 19, 32, 33 and 47 of that Excerpt reflect that Mark Pata was the U.S. Safety Inspector assigned to be present each day

at the foot of this muck pile. Harold Whitney and Jesse Wert were Mr. Pata's supervising Inspectors. In these Excerpts Mr. Pata clearly testified that during this time period after March 4 and before the accident of April 18, he felt that it was a problem that the contractor was digging the base away from this mammoth rock pile and creating a possible slide. The Safety Manager, Mr. Pata's boss, conceded that it was "dumb to take the support out from underneath it". On April 14, 1986, four days before the accident (Excerpt of Record page 66), the United States Safety Inspector's Daily Report, which showed initials by all United States Engineers at the job site, specifically noted that the contractor continued to dig away the bottom of this muck pile and that the pile was "hung up" on the vertical slope because of conveyor belting and boards "embedded in the muck pile, the material isn't sliding down the invert". In other words, notwithstanding the meeting of March 4, every Engineer for the United States Government whose job it was to enforce safety was thereafter *aware on a daily basis* that this huge rock pile was being undermined at its base by the contractor, creating a danger of an enormous rock slide onto employees of the United States Government and the contractor assigned to work at the very base of this rock pile.

This continuing conduct on the part of the United States Inspectors cannot be explained on the basis that Nevada law does not require federal inspectors to act in a more reasonable manner. In addition, because the United States contractually chose to retain the right to enforce federal safety regulations by having its Inspectors on this federal land on a daily basis, the Constitution of the United States precludes any state from preempting how federal employees shall conduct themselves in the performance of federal duties on federal property.

In addition to the authorities set forth in the petition, this Court's holding in *Ivanhoe Irrigation v. McCracken*, 357 U.S. 275 (1958), further demonstrates why the

Solicitor General and the Ninth Circuit should be required to at least address petitioner's issue. This Court stated:

> In developing these projects the United States is expending federal funds and acquiring federal property for a valid public and national purpose, the promotion of agriculture. This power flows not only from the General Welfare Clause of Art. I, § 8, of the Constitution, but also from Art. IV, § 3, relating to the management and disposal of federal property. As this Court said in United States v. City and County of San Francisco, 1940, 310 U.S. 16, 29-30, 60 S.Ct. 749, 756, 84 L.Ed. 1050, this "power over the public land entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.' " See also *United States v. State of California*, 1947, 332 U.S. 19, 27, 67 S.Ct. 1658, 1662, 91 L.Ed. 1889, and *State of Alabama v. State of Texas*, 1954, 347 U.S. 272, 273-274, 74 S.Ct. 481, 482, 98 L.Ed. 689.
>
> Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges. See *Berman v. Parker*, 1954, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27, and *Federal Power Comm. v. Idaho Power Co.*, 1952, 344 U.S. 17, 73 S.Ct. 85, 97 L.Ed. 15. The lesson of these cases is that the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof. Conversely, a State cannot compel use of federal property on terms other than those prescribed or authorized by Congress. *Public Utilities Comm. of State of California v. United States*, 1958, 355 U.S. 534, 78 S.Ct. 446, 2 L.Ed.2d 470. (*Ivanhoe Irrigation v. McCracken*, 357 U.S. 275, 295, 78 S.Ct. 1174, 1185.)

Neither the Ninth Circuit nor the Solicitor General has provided this Court with a single citation which would allow the State of Nevada to set the standard for federal

employees performing their responsibilities in the management of federal property.

III. THE UNITED STATES SAFETY INSPECTORS DID HAVE A DUTY TO ACT

The Solicitor General's meager response to this Petition is that the Petitioner has not pointed to any particular statutory duty that the Government failed to perform. Making such an assertion does not address the fact that the District Court in its very first conclusion of law stated that a "negligent defendant is responsible for all foreseeable consequences proximately caused by its negligence. NRS § 41.130, *Taylor v. Silva*, 96 Nev. 738, 615 P.2d 970 (1980); *Nevada Transfer v. Warehouse Company*, 60 Nev. 87, 99 P.2d 633 (1940)."

NRS § 41.130 sets forth a clear duty owed by the United States:

> Whenever any person shall suffer personal injury by wrongful act, neglect or default of another, the person causing the injury shall be liable to the person injured for damages; and where the person causing such injury is employed by another person or corporation responsible for his conduct, such person or corporation so responsible shall be liable to the person injured for damages.

The Nevada cases cited by the District Court are more specific regarding certain duties pertaining to ownership of land:

> The condition was known to Ginnochio, and it was negligence on his part to direct her to go there without warning her of the danger in her path. The general rule applicable here is well expressed in 45 C.J., p. 875, as follows: "If the owner of land knows that its condition is unsafe he should give timely warning to persons rightfully there. More specifically, an owner or occupant of lands or buildings who knows, or in the exercise of reasonable care should know, of their dangerous and unsafe condition and who invites

> others to enter upon the property owes to such invitees a duty to warn them of the danger, where the peril is hidden, latent, or concealed or the invitees are without knowledge thereof. (*See, Nevada Transfer, supra*)

It is this Nevada statutory and case law duty that the District Court concluded the United States breached. The Solicitor General does not even suggest that the U.S. as the owner of Hoover Dam met this duty.

Furthermore, Congress specifically requires federal employees to "exercise due care" in the "execution of a statute or regulation" (28 U.S.C. § 2680(a)). This Court has specifically held that such federal employee due care "implies at least some minimal concern for the rights of others" (*Hatahley v. U.S.*, 351 U.S. 173, 181, 76 S. Ct. 745 (1956)).

The State of Nevada has the exact same statutory obligation/duty regarding one who is executing a regulation (NRS § 41.032). The Nevada Supreme Court has on several occasions held it is negligent for a public agency employee to execute a regulation without due care (*Hogblam v. State Director*, 93 Nev. 599, 571 P.2d 1172, 1175 (1977); *State v. Webster*, 88 Nev. 690, 504 P.2d 1316 (1972); *State v. Silva*, 86 Nev. 911, 478 P.2d 591 (1970); *Harrigan v. City of Reno*, 86 Nev. 678, 475 P.2d 94 (1970)).

In *Harrigan*, supra, the Nevada Supreme Court held:

> "Because the city was in control of the parking lot it owed to the plaintiff, a business invitee, the duty to use reasonable care to keep the premises in a reasonably safe condition for the invitee's use. Whether that duty was discharged and whether Mrs. Harrigan's conduct was negligence without which her injuries would not have been suffered are questions of fact for the jury. *Dawson v. Payless for Drugs*, 248 Or. 334, 433 P.2d 1019 (1967); *Leonardo v. Great Atlantic and Pacific Tea Co.*, 340 Mass. 450,

164 N.E.2d 900 (1960); *Martin v. Fox West Coast Theaters Corp.*, 41 Cal.App. 2d 925, 108 P.2d 29 (1940)." (*Harrigan*, supra, 475 P.2d at 96).

Both the statutory duty (NRS § 41.032) and Nevada common law duties (*State v. Silva*, supra and *Harrigan v. City of Reno*, supra), apply with equal force to federal employees performing similar tasks (*Rayonier v. United States* (1957) 352 U.S. 315, 77 S.Ct. 374).

In *Hatahley, supra*, the Department of Interior employees acted pursuant to a Utah statute. This Court recognized that the Secretary of the Interior had promulgated regulations pursuant to the Taylor Grazing Act, 43 U.S.C. § 315, to provide the most beneficial use of the public range and was required to "make such rules and regulations . . . and do any and all things necessary to accomplish the purpose of this act."[1] This Court held that the failure of the Department of Interior employees to comply with their own regulations was not within the meaning of "due care" envisioned by 28 U.S.C. § 2680(a) and consequently the United States Government was liable to the petitioner, notwithstanding the fact that the federal employees believed they were acting pursuant to a Utah statute and had complied with it. (*See also, United States v. Muniz*, 374 U.S. 150, 164-165, 83 S.Ct. 1850 (1963); *Rayonier v. United States*, supra; *United States v. Yellow Cab*, 340 U.S. 543, 548-550, 71 S.Ct. 399, 403 (1951).)

The next separate duty which the District Court concluded the United States breached was "the failure of the government employees to fulfill this retained responsibility for securing compliance with safety rules constitutes negligence. *Camozzi v. Roland/Miller and the United States of America*, 866 Fed.2d 287 (9th Cir. 1989); *McGarry v. United States*, 549 Fed.2d 987 (9th Cir. 1976)."

---

[1] An almost identical Congressional mandate applies to the Bureau in its conduct of operating Hoover Dam (30 U.S.C. § 1).

As this Court held in *Ivanhoe*, supra, the rights and duties of the United States arising pursuant to contractual obligations are not governed by state law. The "power over the public land thus entrusted to Congress is without limitations. And it is not for the courts to say how that trust shall be administered." (*Ivanhoe*, 357 U.S. at 295.)

The existence and breach of these duties as found by the District Court were clearly supported by the evidence and were sufficient to support the Court's finding of liability. The Solicitor General's opposition brief never cites the Nevada statute nor does it address the *Camozzi* and *McGarry* decisions in connection with the District Court's Conclusion of Law No. 4 referred to above. The Solicitor General does not deny that the federal inspetcors were negligent.

The District Court was correct in concluding that United States employees were negligent. As the Court found, government employees attended a meeting on March 4, 1989, where the dangers of a slide from this muck pile were specifically discussed and "thereafter" over the intervening five weeks had a Safety Inspector assigned to the foot of the muck pile watching the contractor dig out the toe of that muck pile; prepare daily reports, and have them initialed by all the Government Safety Engineers at the site (the last one 4 days before the accident wherein it is reported that the contractor is continuing to dig the base away from this muck pile which is "hung up"), and took *no* action. These same U.S. Safety Inspectors admitted knowing the presence of this serious impending disaster; knew they had both federal and state statutory authority to act; knew they had a contractual right to act and did nothing!

In summary, this case involves the District Court's finding of clear, even gross direct negligence by United States employees. The factual basis for such finding of liability is clearly detailed. However, the Ninth Circuit

and Solicitor General refuse to acknowledge those findings.

Respectfully submitted,

R. JAY ENGEL *
ELLYN MOSCOWITZ
ENGEL & GERTLER
44 Montgomery Street
Suite #2000
San Francisco, CA 94104
(415) 399-1300
Attorneys for Petitioner

* Counsel of Record